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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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7590 08/04/2008 Schwegman, Lundberg, Woessner & Kluth, P.A. P.O. Box 2938 Minneapolis, MN 55402				
EXAMINER				
LEE, PHILIP C				
ART UNIT		PAPER NUMBER		
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Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary

Application No.

09/884,674

Applicant(s)

CHU ET AL.

Examiner

PHILIP C. LEE

Art Unit

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 31 March 2008.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1,3-11 and 19-30 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1,3-11 and 19-30 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO/SB/C)
- 4) ☐ Interview Summary (PTO-413)
- 5) ☐ Notice of Informal Patent Application
- 6) ☐ Other: _____
- Paper No(s)/Mail Date _____

1. This action is responsive to the amendment and remarks filed on March 31, 2008.
2. A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. Applicant's submission filed on 3/31/08 has been entered.
3. Claims 1, 3-11 and 19-30 are presented for examination.
4. The text of those sections of Title 35, U.S. code not included in this office action can be found in a prior office action.

Claim Rejections - 35 USC 112

5. The following is a quotation of the first paragraph of 35 U.S.C. 112:

The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same and shall set forth the best mode contemplated by the inventor of carrying out his invention.
6. Claims 25-27 are rejected under 35 U.S.C. 112, first paragraph, as failing to comply with the written description requirement. The claim(s) contains subject matter which was not described in the specification in such a way as to reasonably convey to one skilled in the relevant art that the inventor(s), at the time the application was filed, had possession of the claimed

invention. The limitation of “a plurality of types of measurements of throughput speed” in claim 25 (line 5) is not supported by the specification [i.e., the specification merely mention plurality of types of measurements such as latency and throughput, however the specification does not disclose types of throughput speed].

Claim Rejections - 35 USC 103

6. Claims 1, 3-6, 8-10, 19 and 25-29 are rejected under 35 U.S.C. 103(a) as being unpatentable over Emens et al, U.S. Patent 6,606,643 (hereinafter Emens) in view of Myers et al, U.S. Patent Application Publication 2003/0079005 (hereinafter Myers).

7. Emens was cited in the last office action.

8. As per claim 1, Emens taught the invention substantially as claimed for managing a plurality of sources comprising:

selecting a source from the plurality of sources, the selection made according to empirical measurement of performance of each of the plurality of sources (col. 3, lines 37-46; col. 3, line 66-col. 4, line 3); and
initiating a download of data from the download source of the plurality of sources (abstract; col. 1, lines 10-14; col. 8, lines 20-24; col. 9, lines 59-64).

9. Emens did not teach selecting a type of empirical measurement according to a size of data to be obtained. Myers taught the method comprising selecting a type of empirical measurement (e.g., throughput) of performance from a plurality of types of empirical measurement (e.g., throughput, latency, etc.), wherein the type of empirical measurement is selected according to a size of data to be obtained from at least one of a plurality of sources ([0058]) (e.g., large files that are greater than 1MB)

10. It would have been obvious to one having ordinary skill in the art at the time of the invention was made to combine the teachings of Emens and Myers because Myers's teaching of selecting a type of empirical measurement according to a size of data to be obtained would increase the accuracy of Emens's system by allowing performance evaluation based on the size of the transfer data.

11. As per claims 8 and 10, Emens taught the invention substantially as claimed for managing a plurality of sources, wherein executable instructions capable of directing a processor to perform:

selecting a download source in reference to the empirical measurement of the throughput speed of each of the plurality of sources (col. 3, line 66-col. 4, line 3) (Note that the throughput speed is interpreted as the throughput time (i.e. roundtrip time) as defined according to the specification, page 17, lines 1-7, if the size of the transmission and response is equal for each source tested.); and

initiating a download of data from a download source of the plurality of sources (abstract; col. 1, lines 10-14; col. 8, lines 20-24; col. 9, lines 59-64).

12. Emens did not teach selecting a type of empirical measurement according to a size of data to be obtained. Myers taught selecting a type of empirical measurement (e.g., throughput) of performance from a plurality of types of empirical measurement (e.g., throughput, latency, etc.), wherein the type of empirical measurement is selected according to a size of data to be obtained from at least one of a plurality of sources ([0058]) (e.g., large files that are greater than 1MB)

13. It would have been obvious to one having ordinary skill in the art at the time of the invention was made to combine the teachings of Emens and Myers because Myers's teaching of selecting a type of empirical measurement according to a size of data to be obtained would increase the accuracy of Emens's system by allowing performance evaluation based on the size of the transfer data.

14. As per claim 25, Emens taught the invention substantially as claimed for managing sources in a peer-to-peer network (i.e. data can be exchange freely between two computer) (col. 4, lines 19-22) comprising:

a processor (inherently comprised); and

the software means selecting a download source in reference to the empirical measurements of the throughput speed of each of the plurality of sources (col. 3, lines 47-58; col. 3, line 66-col. 4, line 3); and
a transmitter to initiate a download of data to a download source of the plurality of sources (abstract; col. 1, lines 10-14; col. 8, lines 20-24; col. 9, lines 59-64).

15. Emens did not teach selecting a type of empirical measurement according to a size of data to be obtained. Myers taught software means operative on the processor for selecting a type of empirical measurement (e.g., throughput) of performance from a plurality of types of empirical measurement of throughput speed of each of the plurality of sources, the type of empirical measurement is selected according to a size of data to be obtained from at least one of a plurality of sources ([0058]) (e.g., large files that are greater than 1MB); the software means including obtainer means to obtain an empirical measurement, the empirical measurement comprising of a throughput speed of each of the plurality of sources from at least one third-part source ([0058], [0098] and [0103]).

16. It would have been obvious to one having ordinary skill in the art at the time of the invention was made to combine the teachings of Emens and Myers because Myers's teaching of selecting a type of empirical measurement according to a size of data to be obtained would increase the accuracy of Emens's system by allowing performance evaluation based on the size of the transfer data.

17. As per claim 28, Emens taught the invention substantially as claimed comprising:
- a determiner (e.g. the calibration applets) of empirical measurements of a throughput speed of each of a plurality of download peer-to-peer network sources (i.e. data can be exchange freely between two computer) (col. 4, lines 19-22; col. 7, lines 44-54);
 - a selector (e.g. the calibration manager) of a download source in reference to the empirical measurement of the throughput speed of each of the plurality of peer-to-peer network sources (col. 7, lines 44-54); and
 - a transmitter to initiate a download of data from the download source of the plurality of peer-to-peer network sources (abstract; col. 1, lines 10-14; col. 8, lines 20-24; col. 9, lines 59-64).
18. Emens did not teach selecting according to a size of data to be obtained. Myers taught a determiner operable to select a type of empirical measurement and to select an empirical measurement of a throughput speed having the selection type for each of the plurality of sources from at least one third-party source, the type of empirical measurement selected according to a size of data to be obtained from at least one of the plurality of download peer-to-peer sources ([0058], [0098] and [0103]).
19. It would have been obvious to one having ordinary skill in the art at the time of the invention was made to combine the teachings of Emens and Myers because Myers's teaching of selecting a type of empirical measurement according to a size of data to be obtained would

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increase the accuracy of Emens's system by allowing performance evaluation based on the size of the transfer data.

20. As per claim 3, Emens and Myers taught the invention substantially as claimed in claim 1 above. Emens further taught obtaining an empirical measurement of performance of each of the plurality of sources from a local source (col. 8, lines 25-40).

21. As per claim 4, Emens and Myers taught the invention substantially as claimed in claim 1 above. Myers further taught that the performance includes throughput speed ([0058]).

22. It would have been obvious to one having ordinary skill in the art at the time of the invention was made to combine the teachings of Emens and Myers for the same reason as claim 1 above.

23. As per claims 5 and 27, Emens and Myers taught the invention substantially as claimed in claims 1 and 25 above. Emens further taught wherein the performance comprises latency (col. 3, lines 55-56).

24. As per claim 6, Emens and Myers taught the invention substantially as claimed in claim 3 above. Emens further taught wherein the obtaining the empirical measurement further comprises:

measuring the elapsed time of a transmission involving each of the plurality of sources (col. 3, lines 56-58).

25. As per claim 9, Emens and Myers taught the invention substantially as claimed in claim 8 above. Myers further taught wherein the throughput speed further comprises a download speed ([0058]).

26. It would have been obvious to one having ordinary skill in the art at the time of the invention was made to combine the teachings of Emens and Myers for the same reason as claim 8 above.

27. As per claim 19, Emens and Myers taught the invention substantially as claimed in claim 8 above. Emens further taught wherein source further comprises a source in a peer-to-peer network (i.e. data can be exchange freely between two computer) (col. 4, lines 19-22).

28. As per claim 26 Emens and Myers taught the invention substantially as claimed in claim 25 above. Emens further taught wherein the throughput speed further comprises a round-trip time (col. 5, lines 48-49).

29. As per claim 29, Emens and Myers taught the invention substantially as claimed in claim 28 above. Emens further taught comprising:

a transmitter (e.g. the calibration applets) to transmit a message to a download source of the plurality of sources (col. 3, lines 49-51);

a recorder (e.g. timer) of the time of a transmission of a message, operably coupled to the transmitter (col. 5, lines 42-45);

a receiver of a response to the transmission from the source, operably coupled to the transmitter (col. 3, lines 51-53);

a recorder (e.g. timer) of the time of receipt of a response (col. 5, lines 42-45); and

a determiner (e.g. the calibration manager) of the throughput speed of the source, from the difference between the receipt time and the transmission time (col. 3, lines 56-58; col. 5, lines 42-49).

30. Claims 7, 11 and 20 are rejected under 35 U.S.C. 103(a) as being unpatentable over Emens and Myers in view of Ramanathan et al, U.S. Patent 5,913,041 (hereinafter Ramanathan).

31. Ramanathan was cited in the previous office action.

32. As per claims 7, 11 and 20, Emens and Myers taught the invention substantially as claimed in claims 3, 8 and 10 above. Although Emens and Myers further taught wherein obtaining the empirical measurement further comprises for each of the plurality of sources:

initiating a transmission to a download source of the plurality of sources (see Emens, col. 3, lines 49-51); receiving a response to the transmission from the source (see Emens, col. 3, lines 51-53); and determining the throughput speed of the source from the difference

between the receipt time and the transmission time (see Emens, col. 3, lines 56-58; col. 5, lines 42-49), however, Emens and Myers did not specifically teach recording transmission time from the current time and data. Ramanathan taught recording transmission time from the current time and date (see Ramanathan, col. 5, lines 52-62); and recording the receipt time from the current date and time (see Ramanathan, col. 5, lines 52-62).

33. It would have been obvious to one having ordinary skill in the art at the time of the invention was made to combine the teachings of Emens, Myers and Ramanathan because Ramanathan's teaching of recording transmission time from the current time and data would increase the alertness of Emens's and Myers's systems by allowing a user to monitor the transaction with the external network.

34. Claims 21-23 and 30 are rejected under 35 U.S.C. 103(a) as being unpatentable over Emens and Myers in view of Andrews et al, U.S. Patent Application Publication 2002/0038360 (hereinafter Andrews).

35. Andrews was cited in the last office action.

36. As per claim 21, Emens taught the invention substantially as claimed for managing a plurality of sources comprising:

obtaining a list comprising a plurality of identification of sources (col. 3, lines 38-46);

initiating a plurality of connections, the plurality of connections further comprising one connection for each of the plurality of sources, yielding a plurality of initiated connections (col. 3, lines 48-51);
receiving a response for each of the plurality of initiated connections, yielding a plurality of responses (col. 3, lines 51-53);
selecting a download source of the plurality of sources in reference to an empirical measurement of performance (col. 3, line 66-col. 4, line 3); and
initiating a download of data from the selected download source of the plurality of sources (abstract; col. 1, lines 10-14; col. 8, lines 20-24; col. 9, lines 59-64).

37. Emens did not teach selecting a type of empirical measurement according to a predetermined file size. Myers taught selecting a type (e.g., throughput) from a plurality of types of empirical measurement of performance (e.g., throughput, latency, etc.) of each of the plurality of sources ([0058], [0098] and [0103]), wherein the type of empirical measurement selected according to a predetermined file size ([0058]) (e.g., large files that are greater than 1MB)

38. It would have been obvious to one having ordinary skill in the art at the time of the invention was made to combine the teachings of Emens and Myers because Myers's teaching of selecting a type of empirical measurement according to a predetermined file size would increase the accuracy of Emens's system by allowing performance evaluation based on the size of the transfer data.

39. Emens and Myers did not teach socket connections. Andrews taught socket connections (i.e. three way handshakes) could be measured for client accessing a content server (page 4, paragraphs 46 and 47). Note that it is inherent that a three-way handshake is to establish socket connection between a client and a server. The three-way handshake includes initiating a socket connection by using synchronization (SYN message) and receiving a response (ACK message) for the initiated socket connection.

40. It would have been obvious to one having ordinary skill in the art at the time of the invention was made to combine the teachings of Emens, Myers and Andrews because Andrews's method of measuring the socket connections would increase the efficiency of Emens's and Myers's systems by locating content servers in response to the minimal round trip time (page 1, paragraph 8).

41. As per claim 22, Emens, Myers and Andrews taught the invention substantially as claimed in claim 21 above. Emens further taught wherein the selecting further comprises:

selecting the source associated with the response that is received first (col. 3, lines 47-58; col. 3, line 66-col. 4, line 6).

42. As per claim 23, Emens, Myers and Andrews taught the invention substantially as claimed in claim 21 above. Emens further taught wherein the selecting further comprises:

measuring the latency of each of the plurality of sources (col. 3, lines 47-58); and

selecting a source in reference to the download speed of each of the plurality of sources (col. 3, line 66-col. 4, line 6).

43. As per claim 30, Emens and Myers taught the invention substantially as claimed in claim 28 above. Emens and Myers did not specifically detailing the establishment of the socket connection comprising a TCP/IP synchronized idle message and a TCP/IP acknowledgment message. Andrews taught wherein the transmission further comprises a TCP/IP synchronized idle message (page 4, paragraph 47); and the response further comprises a TCP/IP acknowledgment message (page 4, paragraph 47).

44. It would have been obvious to one having ordinary skill in the art at the time of the invention was made to combine the teachings of Emens, Myers and Andrews because Andrews's method of comprising a TCP/IP synchronized idle message and a TCP/IP acknowledgment message would increase the capability of Emens's and Myers's systems by allowing establishment of a socket connection for accessing content on the server.

45. Claim 24 is rejected under 35 U.S.C. 103(a) as being unpatentable over Emens, Myers and Andrews in view of Ramanathan.

46. As per claim 24, Emens, Myers and Andrews taught the invention substantially as claimed in claim 23 above. Although Emens and Andrews further taught wherein measuring the latency further comprises:

storing a time of each of the plurality of initiating socket connection (see Emens, col. 5, lines 42-45; see Andrews, page 4, paragraphs 46 and 47);

storing the time of each of the plurality of responses (see Emens, col. 5, lines 42-45); and

determining the download speed of each of the plurality of sources from the differences in time between the time of each of the plurality of the responses and the time of each of the plurality of the initiating socket connections (see Emens, col. 3, lines 56-58; col. 5, lines 42-49; see Andrews, page 4, paragraphs 46 and 47). (Note that the download speed could be the throughput speed (i.e. or could be the throughput time if the size of the transmission and response is equal for each source tested according to the specification on page 17, lines 1-7) according to the specification, page 13, lines 1-4), however, Emens and Andrews did not teach including a date with the transmission time or the receipt time. Ramanathan taught the method of recording the time and date (col. 5, lines 52-62).

47. It would have been obvious to one having ordinary skill in the art at the time of the invention was made to combine the teachings of Emens, Myers, Andrews and Ramanathan because Ramanathan's teaching of recording the transmission date and receipt date would increase the alertness of Emens's, Myers's and Andrews's systems by allowing a user to monitor the transaction with the external network.

48. Applicant's arguments with respect to claims 1, 3-11 and 19-30, filed 03/31/08, have been fully considered but they are moot in view of new grounds of rejection.

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49. A shortened statutory period for reply to this Office action is set to expire THREE MONTHS from the mailing date of this action. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Philip C Lee whose telephone number is (571)272-3967. The examiner can normally be reached on 8 AM TO 5:30 PM Monday to Thursday and every other Friday. If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Bunjob Jaroenchonwanit can be reached on (571) 272-3913. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300. Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

/Philip C Lee/

Patent Examiner, Art Unit 2152